

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-56

July 13, 2000

BANGOR HYDRO-ELECTRIC COMPANY.
Request For Approval of Reorganization
And Of Affiliated Interest Transactions To
Establish A Subsidiary, Bangor Fiber, For
The Purpose of Providing Multi-Strand
Fiber optic Cable to Communications
Carriers Within Its Service Territory

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we approve Bangor Hydro-Electric Company's (BHE) petition for approval of reorganization, pursuant to 35-A M.R.S.A § 708, and affiliated interest transactions in accordance with 35-A M.R.S.A. § 707. BHE seeks approval to form and capitalize Bangor Fiber Company, Inc. (Bangor Fiber) as a wholly-owned corporate subsidiary of BHE for the purpose of carrying on a non-core business. In approving this petition we do not approve or disapprove BHE's cost allocation manual because of the limited nature of BHE's projected use of BHE's support services. We require that Bangor Fiber's activities be accounted for consistent with the provisions of Chapter 820. Finally, we reserve for subsequent rate cases any determination about the prudence of BHE's decision to structure the transaction in the manner it chooses.

II. PROCEDURAL HISTORY

On January 24, 2000, BHE filed with this Commission its petition for the approvals under sections 707 and 708 of Title 35-A necessary to form Bangor Fiber. It also filed a Motion for Protective Order requesting a protective order covering certain confidential and proprietary information.

On March 6, 2000, the Hearing Examiner issued a Notice of Proceeding and Procedural Order. The Hearing Examiner also issued Temporary Protective Order No. 1 making certain business information confidential.

The Public Advocate, MaineCom, Mid-Maine Tel-Plus and CMP intervened in this matter. The Commission held technical conferences on April 27 and May 11, 2000. Parties waived the *ex parte* rule so that Advisors could communicate with BHE to follow up on the responses to Advisors Data Requests. On May 11, 2000, the Hearing Examiner issued a Procedural Order notifying the parties that the Advisory Staff would follow up on the responses to the oral data requests unless the parties filed objections by May 12, 2000. The Advisors and BHE thereafter communicated for the purpose of

clarifying BHE's responses to the Advisor's Data Requests. On June 15, 2000, the Commission held a telephonic conference of counsel. Participants in the conference agreed, based on the Advisors' oral summary of the basis for their recommendation, to the issuance of an Examiner's report and the opportunity for exceptions without the need to file briefs in this case. An Examiner's Report issued on June 23, 2000. BHE filed comments and exceptions to that report on June 29, 2000.

III. RECORD

The record in this proceeding includes all filings, data responses, transcripts, and any other materials provided in this proceeding.

IV. PROTECTIVE ORDER

On March 17, 2000, Lincolnville Communications, Inc., a competitive telecommunications provider and a party to a fiber optic licensing agreement with BHE, filed a motion to modify, with respect to its agreement with BHE, that aspect of the Protective Order which provides for termination of protection after one year. It also requested notification if its request was denied so it could petition for intervention to pursue its legal rights. In its exceptions, BHE requested that the one-year expiration of protection also should be eliminated for the confidential information which it submitted.

We determine that the Protective Order should be modified to eliminate the one-year expiration of protection with respect to the Lincolnville contract but not with respect to other matters under protective order. With respect to the information submitted by BHE, we are unable to conclude on the basis of its exceptions that protection for this material is warranted after one year. BHE may file a motion seeking extended protection no later than 30 days prior to the expiration of protection for materials submitted by BHE. In its motion, BHE should explain why protection is still warranted.

V. DISCUSSION

A. BHE's Request

BHE proposed to form Bangor Fiber for the purpose of providing multi-strand fiber optic cables to communication carriers and cable service providers within its service territory. BHE's initial capitalization of Bangor Fiber will include the transfer to Bangor Fiber of several fiber optic projects already constructed by BHE. BHE expects that Bangor Fiber will construct additional fiber runs in the coming years.

Bangor Fiber's fiber optic cable will be connected to BHE's transmission facilities (and possibly its distribution facilities), and/or run through its conduits, pursuant to agreements submitted with its petition for approval as affiliated interest transactions. BHE intends that Bangor Fiber will make fiber capacity available to (1) entities engaged in communications and related activities, and (2) BHE for BHE's internal communications and transfer station relay purposes. BHE will provide support services

to Bangor Fiber pursuant to a Support Services Agreement that it also submitted for approval.

BHE also seeks authority to transfer an existing Fiber Optic License Agreement, currently between BHE and Lincolnville Communications, Inc. (Lincolnville), to Bangor Fiber since Bangor Fiber will become the owner of the fiber, a portion of which is subject to that agreement.

Finally, BHE also sought confirmation that Bangor Fiber will not be a public utility telephone company due to the scope and character of its offerings.

B. Analysis

The Commission must find that the reorganization is consistent with the interests of the utility's ratepayers and investors. 35-A M.R.S.A. § 708(2)(A). In granting the approvals, the Commission may impose any terms, conditions or requirements it determines are necessary to protect the interests of ratepayers. These may include conditions to assure: reasonable access to books and records; the continued ability of the Commission to regulate transactions between affiliated interests; the utility's continued ability to provide safe reasonable adequate service; the absence of any impairment of, or adverse affect on, the utility's credit; and reasonable limits on the total level of investment in nonutility business. 35-A M.R.S.A. § 708(2)(A)(1-9). The standard for approving an affiliated interest transaction is that the agreement is not adverse to the public interest. 35-A M.R.S.A. § 707(3). In making these determinations, we examine the following aspects of the transaction:

- (1) The transfer to Bangor Fiber of existing fiber optic lines and Bangor Fiber's ownership of fiber optic lines that may be constructed as part of the arrangement for which BHE seeks approval.
- (2) The fees that BHE will pay to Bangor Fiber to lease the fiber optic facilities it needs for its operations.
- (3) The fees that BHE will receive from Bangor Fiber for attaching its fiber optic lines to BHE's transmission and distribution lines.
- (4) The support services agreement between BHE and Bangor Fiber.

1. Transfer of Assets

BHE proposes to transfer its existing investment in fiber optics to Bangor Fiber. BHE has represented that all costs related to its Fiber Projects have been accounted for below the line on the books of BHE. The transfer would take the form of an accounting entry, and the original cost would equal BHE's investment in its wholly-owned subsidiary. With the exception of the fiber optics built for the Lincolnville Project, BHE is using some fibers in each of its approximately 41 miles of fiber optic

cables in its utility operations to provide substation relay links and to meet other communications needs between substations.

BHE could meet its needs by retaining ownership to the fibers needed or transferring ownership and leasing back enough fibers to meet its needs. BHE chose the latter option. The Advisory Staff engaged in discovery to determine the impact on BHE's revenues, if any, of BHE's decision to lease the fibers back from Bangor Fiber instead of retaining ownership of the fibers and leasing to its affiliate all but those it required (or expected it would require) for its utility purposes.¹ The staff analysis revealed that the revenue impact of the decision, which varied depending on the assumptions made, was not large under any scenario. This fact and our deferral of any consideration of prudence or reasonableness of BHE's actions in structuring this transaction support a conclusion that this aspect of the arrangement is not adverse to the public interest.

We also make the following findings:

- (1) Under the leasing arrangement proposed with Bangor Fiber, BHE will pay an amount per fiber mile for each fiber leased. The amount paid is subject to a protective order; however, BHE provided a study (also confidential) showing that the amount is within the range of market values for leasing fibers. We conclude therefore that this arrangement meets the requirements of Chapter 820 § 4.
- (2) BHE has also requested that we approve the agreement between it and Bangor Fiber that allows Bangor Fiber to attach its fiber optic cables to BHE's transmission and/or distribution facilities. BHE will receive \$3,600 per mile annually. The amounts received under this agreement would be considered above-the-line as the agreement contemplates the use of utility property. The annual fee was based upon BHE's review of a benchmark study showing the current market prices for attaching fiber optics to transmission towers and the current prices for dark fiber leasing. The results of this confidential study show that the rate BHE would receive is within that market range. We conclude this agreement is consistent with the provisions of Chapter 820 § 4.
- (3) BHE also requests approval of the Support Services Agreement that would allow it to provide services to Bangor Fiber. Under this agreement, BHE will directly charge to Bangor Fiber costs incurred on its behalf. These costs include outside contractor fees, materials costs, and engineering fees. Where direct charges are

¹ The latter arrangement is the one that forms the basis for the MaineCom's arrangement with CMP.

not possible, BHE will charge Bangor Fiber costs using its cost allocation manual. Because BHE has represented that the use of BHE support services will be very limited, we approve the Support Services Agreement even though we have not yet approved the methodology used by BHE to determine cost allocations. We do not approve the cost allocation manual in approving the Support Services Agreement. We will require BHE to work with the staff to ensure that the cost allocation manual is consistent with the requirements of Chapter 820.

- (4) BHE has agreed to be subject to certain conditions established in an earlier case involving MaineCom, CMP's affiliate.² These conditions address concerns about a utility's possible preferential treatment of its affiliate in granting access to space on utility poles. We agree that these conditions should be applicable to BHE's pole attachment arrangements with Bangor Fiber and with non-affiliated utilities seeking access to BHE's poles. Therefore, we incorporate these conditions herein by reference.
- (5) BHE seeks a determination that Bangor Fiber is not a public utility. BHE states that it "expects that the bulk of BangorCom's arrangements with fiber customers will be individually negotiated deals." BHE does not foreclose the possibility that it would hold out service at a given price to any taker. Because it is not clear from the filing that Bangor Fiber's proposed activities are inconsistent with a determination of public utility status, we keep this docket open to allow BHE to provide additional information on this question. We direct the Examiner to establish procedures necessary for the expedited determination of this question.

IV. CONCLUSION

We approve BHE's petition under Sections 707 and 708 of Title 35-A consistent with this Order and keep this docket open to allow for an expedited determination of whether Bangor Fiber should be considered to be a public utility.

Dated at Augusta, Maine, this 13th day of July, 2000.

BY ORDER OF THE COMMISSION

² These conditions are set forth in the following orders: *Central Maine Power Company, Request for Approval of Facility License Agreement with MaineCom Services*, Docket No. 96-421, Order, Part II at 6-8 (Oct. 29, 1996) and Order on Reconsideration (Feb. 19, 1997) at 3-6.

Raymond J. Robichaud
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.